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No. 05-493

Supreme Court, U.S.
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In The
Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

v.

FERNANDO BELMONTES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

A. Proceedings Below.

Respondent Fernando Belmontes was charged in San Joaquin County Superior Court with the March 15, 1981 murder of Steacy McConnell, accompanied by robbery and burglary special circumstance allegations. One co-defendant, Bobby Bolanos, turned state's evidence and was permitted to plead to a simple burglary. Another co-defendant, Domingo Vasquez, was permitted to plead guilty to second-degree murder. Respondent went to trial, was convicted as charged, and following a penalty trial was sentenced to death on October 6, 1982.

The judgment was affirmed by the California Supreme Court on June 23, 1988. *People* v. *Belmontes*, 45 Cal.3d 744 (1988). This Court denied respondent's petition for writ of certiorari on January 3, 1989. Respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, upon which proceedings were stayed while respondent exhausted state remedies as to certain claims.

On June 29, 1993, upon denial of the habeas corpus petition by the California Supreme Court, the district court lifted the stay of the 28 U.S.C. § 2254 action, and respondent filed an amended petition.

On May 14, 2001, the district court entered a judgment denying the petition. This appeal followed. The Ninth Circuit issued an opinion granting habeas corpus relief, *Belmontes* v. *Woodford*, 359 F.3d 1079 (9th Cir. 2004) [*Belmontes I*]. This Court granted certiorari and remanded for further consideration in light of *Brown* v. *Payton*, 544 U.S. 133 (2005). *Brown* v. *Belmontes*, 125 S.Ct. 1697

(2005). The Ninth Circuit then issued *Belmontes* v. *Brown*, 414 F.3d 1094 (9th Cir. 2005) [*Belmontes II*], and this Court granted certiorari.

B. Guilt Phase Evidence.

Respondent's summary of the trial facts relating to the guilt determination is adapted from the opinion of the California Supreme Court, *People* v. *Belmontes*, 45 Cal.3d 744, *cert. denied*, 488 U.S. 1034 (1989).

On Sunday, March 15, 1981, the parents of 19-year-old Steacy McConnell found her beaten unconscious on the floor of her residence in Victor. She had telephoned them that same morning to advise that several people, including Domingo Vasquez, had been threatening her. Id. at 760.

McConnell died a short while later from cerebral hemorrhaging due to 15 to 20 gaping wounds to her head that cracked her skull. All wounds were consistent with having been made by the metal dumbbell bar in evidence at trial. Her residence had been burglarized. Id. at 760-761.

Belmontes, then on parole from the California Youth Authority, was spending the weekend with Bobby Bolanos in Lodi. Both knew Domingo Vasquez, who was acquainted with McConnell. During the week preceding the murder, Vasquez, Bolanos and others had "partied" at McConnell's house. Vasquez "ripped off" a quantity of amphetamine pills from her; the party ended with McConnell throwing Vasquez and his friends out of her house two days prior to the murder. Id. at 761-62.

Belmontes, Vasquez and Bolanos decided to burglarize McConnell's house, believing that she would not be home

that particular day. Vasquez's girlfriend, Carrie Lynn Rogers, testified that as the three men left her apartment to commit the burglary, Belmontes picked up a steel dumbbell bar which he carried out with him. Ibid.

Bolanos was the "wheel man" and never entered McConnell's residence. While Bolanos drove to her house, Belmontes suggested that he alone would approach the house on foot, using the metal bar if needed to force entry. Belmontes entered and Vasquesz followed him inside several minutes later.

Shortly thereafter, Belmontes and Vasquez emerged from the house carrying stereo components. Belmontes was covered with blood sprinkled on his face, pants and shoes. Vasquez "looked like he had seen a ghost." Belmontes said that he had to "take out a witness" because she was home. He explained that McConnell heard Vasquez and Bolanos drive up, and that he hit her with the bar when she looked away from him, and continued to hit her approximately 15 more times. Ibid.

The three drove to the nearby city of Galt, sold the stereo, and split the proceeds. Belmontes was arrested in Southern California six days after the murder. Blood found on the tongue of one of his shoes was tested and found to be "type O," consistent with the victim's.

Belmontes' defense was that he abandoned all intent to go through with the burglary once he knocked on the door and discovered McConnell at home. Although he struck McConnell once with the bar, it was only at Vasquez's direction and he did not intend to kill her. Vasquez must have dealt the additional fatal blows to McConnell while defendant was breaking into and searching the back rooms of the house. Id. at 763-764.

C. Penalty Phase Proceedings.

Respondent submits the following summary of the penalty proceedings drawn from the California Supreme Court opinion and from the transcript contained in the Joint Appendix (J.A.).

1. Evidence in aggravation.

At the penalty phase the prosecutor introduced evidence of (1) respondent's acquisition of a handgun in early 1979; (2) respondent's carrying the gun for protection during the same time period; (3) his April 1979 conviction as an accessory to voluntary manslaughter; (4) a domestic assault and battery involving respondent's girlfriend, Barbara Murillo, during the month preceding McConnell's murder; (5) an altercation occurring while respondent was a ward in a county youth facility; and (6) autopsy photographs depicting the nature and extent of McConnell's fatal injuries. Id. at 795.

2. Evidence in mitigation.

The defense evidence, set forth in its entirety at J.A. 5-115, described (1) respondent's difficult childhood through the testimony of his mother and his maternal grandfather, particularly regarding respondent's alcoholic and abusive father; (2) respondent's friendships during his youth with other young people who had a positive opinion of him; (3) respondent's religious study efforts during his 1979-1981 commitment to the Youth Authority, through the testimony of Youth Authority Chaplain Barrett, the testimony of the local parishioners Fred and Beverly Haro who took respondent into their home on a regular basis, and the testimony of an assistant Youth Authority chaplain;

(4) respondent's positive influence on other youths in the course of his religious activities during the Youth Authority commitment; and (5) respondent's other positive accomplishments during the Youth Authority commitment, including his earning a position of responsibility on the fire crew that patrolled the Sierra foothills.

3. The penalty arguments, instructions, and deliberations.

Following the penalty evidence, counsel and the court discussed various potential jury instructions, and eventually broached CALJIC No. 8.84.1 ["Penalty Trial Factors for Consideration"], J.A. 133. The court and counsel whittled the eleven statutory factors down to seven factors potentially applicable to this case, with statutory factor (k) renumbered as factor (g). J.A. 136.

Defense counsel then submitted one request for special jury findings as to aggravating and mitigating factors raised by the evidence, consisting of one list of potential aggravating factors, IV Clerk's Transcript (CT) 1015, and one list of potential mitigating factors, IV CT 1016-1018. The proposed mitigating factors included precisely those raised by the *Skipper* evidence.[1] *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). The trial court stated that "I think it would be very helpful for us to have some

[1] Proposed mitigating factor (7) was that "[h]is ability to counsel and work with other troubled persons renders it likely that he will be able to benefit society by being allowed to live in prison and perform such work"; proposed factor (8) was that "[h]e has shown that he can live in confinement without acts of violence or any life threatening activity and thus society is protected by his imprisonment for life." IV CT 1018.

findings by the jury," but because the factors were "numerous, both in mitigation, as well as in aggravation" the proposal for two sets of special findings was denied: "Perhaps in the future that will need to be done, but at this stage I don't think we should do it as proposed." J.A. 143.

In conjunction with the request for special findings as to aggravating and mitigating factors, defense counsel requested certain additional special instructions. The court agreed to give instruction No. 1, to the effect that "[t]he fact that you have found Mr. Belmontes guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating factor." J.A. 141, 185. The court also agreed to give No. 2, which correctly informed the jury that only enumerated aggravating factors could be considered, see J.A. 141, 185-186, but it also stated that "I have previously read to you the list of aggravating circumstances which the law permits you to consider. . . ." J.A. 185. In fact, that "list of aggravating factors" was contained in the proposed special findings that the court *refused*.

Next, the court agreed to give a modified version of defendant's proposed instruction No. 3 that also referred to a prior reading of mitigating circumstances, again a reference to the proposed special findings instruction that contained separate lists of the aggravating and mitigating factors. Proposed instruction No. 3 is set forth in full below, with the parts actually given indicated by regular or bold type, and the refused portions indicated by strike-over:

> However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not

> to impose a death sentence upon Mr. Belmontes. You should pay careful attention to each of those factors. Any one of them ~~may be sufficient~~ standing alone may support a decision that death is not the appropriate punishment in this case. ~~But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances [relating to the case or to the defendant, Mr. Belmontes] as reasons for not imposing the death sentence~~. IV CT 1022; J.A. 186.

The prosecutor's argument, J.A. 147-161, began with a reference to "this listing of aggrevating [sic] and mitigating circumstances which you are to weigh one against the other . . . ," J.A. 148, and then reviewed the seven factors that the court would subsequently instruct on, concluding with a reference to "a catchall, really a catchall, any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." J.A. 153.

In discussing the evidence that arguably fell within each factor, the prosecutor addressed respondent's evidence of religious activities in Youth Authority as follows:

> With respect to these others, I suspect that you will be told – I can't imagine that you won't be told that the defendant's religious experience is within that catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime.
>
> *I'm not sure it really fits in there. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration.* J.A. 154 (emphasis supplied).

Having expressed his reservations that the evidence fell within any of the enumerated factors, the prosecutor proceeded to argue that in any case it should not be given much weight, that "we have to take it with a grain of salt," and "the fact that someone has religion as opposed to someone doesn't should be no grounds for either giving or withholding life." J.A. 155. The prosecutor concluded his argument with a series of rhetorical questions, including, "How do we tell the world that nothing excuses what he did?" J.A. 160.

Respondent then addressed the jury, and took responsibility for his actions:

> You've heard my parents – or my mother, my grandfather talk about my childhood, that it wasn't a very good childhood. I can't use that as a crutch to how I am right now. A lot of people have had rough childhoods and come out a lot better than I have. I realize myself that once I got old enough to know right from wrong, then it was my decision on how I wanted my life to be. So, you know, I can't really say it's on my childhood or how I was brought up or things I didn't have or things I did have. A lot of people are like that. J.A. 162.

Respondent plainly stated that "[a]s for the verdict right here that you're going to deliberate on right now, I myself would like to keep my life and not really lose it in the gas chamber." Ibid.

Defense counsel began his argument with a reference to the statutory factors, and explained to the jury:

> We've taken a moral question, a subjective question, and tried to give it objective dimensions. And I don't mean to try and give you fancy language,

> but we are trying to say, can you take all factors, A, B, C, and D, can you put them on one side and say they aggravate the circumstances or put them on one side and say they mitigate the situation and come up with a decision based upon that. And that is not easy to do, and it is not going to be easy for you to do. J.A. 165.

Defense counsel then responded to the prosecutor's remark – "I can't imagine you won't be told that the defendant's religious experience within that catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime," J.A. 154 – with the following rejoinder:

> I'd like to comment about the evidence that we've presented and what Mr. Sueyres told you he thought it means, *and I'm not going to insult you by telling you I think it excuses in any way what happened here. That is not the reason I asked these people to come in.* J.A. 166 (emphasis supplied).

Having disavowed any claim that the mitigating evidence "in any way" excused the crime, defense counsel continued with a description of respondent's religious awakening during his Youth Authority commitment and exposure to the M-2 program, and an observation that until that point, respondent "didn't really have the sense of values that a human being, a young man about to embark upon adulthood should have." J.A. 167. Counsel reiterated that the testimony about respondent's custodial religious experiences "does not excuse the activity," and acknowledged that "Fernando Belmontes cannot make it on the outside." Counsel contrasted respondent's experience under the Haro's guidance with respondent's experience on his own: "I think it is pretty clear from the

experience that he had inside, the kind of development he understood the kind of experience he had with the Haros as compared with his being placed out on his own." Ibid. Counsel's final plea to the jury called up the testimony of the witnesses regarding respondent's Youth Authority religious experience and urged the jury to consider their testimony with respondent's prospects in prison, "to contribute something in whatever way he can."

> The people who came in here told you about him [respondent]. They told you not only what they know of him, but they gave you, as best they could, under the difficult circumstances of somebody looking at the rest of their life in prison, a game plan, *something he can do with his life, something he's been able to do.* We're just suggesting the tip of the iceberg because who knows in 20, 30, 40, 50 years what sorts of things he can do, as he fits into the system, as he learns to set his goals, *to contribute something in whatever way he can.* J.A. 170 (emphasis supplied).

The trial court instructed the jury the following morning. Pertinent parts of the instructions are as follows:

> In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, *except as hereafter instructed.* You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true;

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence and the expressed or implied threat to use force or violence;

(c) The presence or absence of any prior felony convictions;

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(e) Whether or not the defendant acted under extreme duress or under the substantial domination of another person;

(f) The age of the defendant;

(g) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. J.A. 183-184 (emphasis supplied).

The court then directed the jury to "weigh the mitigating circumstances against the aggravating circumstances that you find established by the evidence," and noted that "I have previously read to you the list of aggravating circumstances which the law permits you to consider. . . ." The court explained that those enumerated factors "are the only aggravating circumstances that you may consider," but that "the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." J.A. 185-186.

This was one of the defense-proposed instructions that the trial court had agreed to give, see J.A. 142, but it had been drafted in conjunction with another defense proposed instruction that the trial court *refused*, i.e., the instruction with the *separate* list of aggravating and mitigating circumstances, J.A. 142. Because there was no instruction that contained a separate list of aggravating factors versus a list of mitigation factors, there was a potential for confusion in that the jury heard both that there was a *single* list of relevant factors (a) through (g), and also that there were separate lists of aggravating factors and mitigating factors. The jury retired to deliberate at 9:56 a.m. J.A. 188.

Just prior to the lunch break, the jury foreman posed two written questions to the court, "What happens if we cannot reach a verdict?", and "Can the majority rule on life imprisonment?". CT 1093. After the lunch break, the court responded to the questions with the jury in open court. J.A. 188-193. The court re-read a prior instruction that "in order to make a determination as to the penalty, all 12 jurors must agree, if you can." J.A. 190. Juror Hailstone followed up:

> Juror Hailstone: If we can't, Judge, what happens?
>
> The Court: I can't tell you that.
>
> Juror Wilson: That is what we wanted to know.
>
> The Court: Okay. I know what will happen, but I can't tell you what will happen.
>
> Mr. Schick: Maybe we should inquire whether the jury could reach a verdict.
>
> The Court: Do you think, Mr. Norton, you will be able to make a decision in this matter?

Juror Hailstone: Not the way it is going.

Juror Norton: That is tough, yes.

The Court: Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?

Juror Norton: I believe there is a possibility.

Juror Huckabay: We did need more time.

The Court: I think so. I think you need more time.

Yes, Mrs. Hern?

Juror Hern: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?

The Court: That was the listing, yes, ma'am.

Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?

The Court: That is right. It is a balancing process.

Mr. Meyer?

Juror Meyer: A specific question, would this be an either/or situation, not a one, if you cannot the other?

The Court: Exactly. If you can make that either/or decision. If you cannot, then I will discharge you.

> Juror Hailstone: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric during this time?
>
> The Court: That is something you cannot consider in making your decision. All right?
>
> We'll ask you return them to the jury room. J.A. 190-191.

The jury continued deliberation throughout the afternoon, and was excused after 5:00 p.m., following the foreman's inquiry about obtaining a copy of the trial transcript, to which the court responded that "you could have any portion of the transcript reread to you at anytime that you wish." J.A. 192.

Later the following morning, the jury sent a note to the trial court asking for a re-read of "Fernando Belmontes's testimony and the pathologist's testimony [and] also the testimony of Bob Bolanos," J.A. 195. Upon questioning, the foreman confirmed that the jury wanted the guilt phase testimony re-read, and the court complied. At 3:34 p.m. that same day the jury returned a verdict of death. J.A. 199.

D. The Panel Majority Decision.

Belmontes II rejected all of respondent's habeas corpus claims arising from guilt and special circumstance issues, and granted relief based on the unusual combination of penalty phase instructions, questions, and arguments. The panel majority found that respondent's Eighth and Fourteenth Amendment rights were violated because the trial court's instructions failed to advise the jury to consider the portion of his mitigating evidence that tended to show that

he would adapt well if sentenced to prison and would become a constructive member of prison society. The panel majority reached this conclusion by applying *Boyde* v. *California*, 494 U.S. 370 (1989) to the record as whole. Relying on *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), the panel majority found that the original jury instructions were ambiguous with respect to *Skipper's* requirement that the jury be informed that it must consider and give effect to evidence bearing on a defendant's probable future good conduct as mitigation; that "[t]he court's supplemental instructions only exacerbated this problem," 414 F.3d at 1135; and that "the trial judge's responses to the jurors' questions during the mid-deliberation colloquy had the effect of "[c]ompounding the problems with the original and supplemental instructions." Id.

SUMMARY OF ARGUMENT

Respondent's penalty presentation included substantial evidence regarding his religious studies and personal accomplishments during a Youth Authority commitment prior to the capital murder. This evidence was offered to show his likely positive institutional adjustment in prison if sentenced to life without parole. As the panel majority concluded, the standard jury instructions initially given did not, on their face, convey the impression that the jury was permitted to consider that evidence in mitigation; supplemental case-specific instructions dealing with factors in aggravation and mitigation confused the subject and afforded inadequate guidance; and the trial court's responses to jurors' questions during a mid-deliberation colloquy created as reasonable probability that the jury resolved an otherwise harmless ambiguity in the instructions by

concluding that it could not consider respondent's favorable prospects of future good conduct and positive behavior in prison as evidenced by his Youth Authority experience.

Respondent's evidence relating to his Youth Authority commitment fell squarely within the rule of *Skipper* v. *South Carolina*, supra, that a capital sentencing jury must be allowed to "consider [] a defendant's past conduct as indicative of his probable future behavior," and where warranted "draw [] favorable inferences" about the defendant's "probable future conduct if sentenced to life in prison," even though the inferences of good future adjustment "would not relate specifically to [his] culpability for the crime he committed." 476 U.S. at 4-5. But respondent's penalty jury was led to believe that evidence of this kind could not be considered in mitigation because it did not fit in the narrow definitional scope of mitigating factors that the trial court increasingly conveyed as he responded to the jurors' requests for clarification of the original instructions.

The probability that the jury understood the court's directions and applied them "in a way that prevent[ed] the consideration of constitutionally relevant evidence," *Boyde* v. *California*, 494 U.S. 370, 380 (1990) is confirmed when the arguments of counsel are considered, because both the prosecutor and defense counsel treated the Youth Authority evidence as outside the scope of California's factor (k) – relating to circumstances that "extenuate the gravity of the crime," or any other factor. The conclusion of the panel majority below that this combination of circumstances resulted in a constitutional violation was entirely consistent with *Boyde*'s teaching concerning factor (k) and was compelled by *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982),

Skipper v. *South Carolina*, 476 U.S. at 5, and *Penry* v. *Lynaugh*, 492 U.S. 302, 318-319 (1989).

ARGUMENT

I. AN UNUSUAL SERIES OF CIRCUMSTANCES AT RESPONDENT'S PENALTY TRIAL COMBINED TO CONVEY TO THE SENTENCING JURY THAT IT WAS NOT PERMITTED TO CONSIDER A SUBSTANTIAL PART OF THE MITIGATION EVIDENCE, VIOLATING THE EIGHTH AND FOURTEENTH AMENDMENTS AS THE COURT OF APPEALS HELD.

The unusual combination of respondent's particular mitigating evidence, a mixture of standard and case-specific jury instructions, and a number of mid-deliberation juror questions coupled with the trial court's improvised answers, combined to deter the jury from considering and giving effect to some of the most compelling of respondent's evidence in mitigation. The standard for relief – whether there is "a reasonable probability that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," *Boyde*, 494 U.S. at 380 – was met in this case. The "most likely explanation," *Weeks* v. *Angelone*, 528 U.S. 225 (2000), for the jury's death verdict is that the increasingly misleading series of instructions culminated in the jury's mistaken impression that it could not consider respondent's substantial evidence of probable future good conduct and positive prison behavior as a basis for mitigating the death sentence. The factors that contributed to this unconstitutional outcome were as follows:

A. Respondent Presented *Skipper* Evidence as a Substantial Part of His Evidence in Mitigation.

Respondent presented a spectrum of mitigating evidence, including a difficult and disadvantaged background; positive conduct and relationships with peers notwithstanding his disadvantaged background; his mother's unqualified expression of affection; and his record of positive accomplishments during a Youth Authority commitment that reflected well for his future prospects for similar institutional adjustment if sentenced to life in prison. It was primarily the Youth Authority evidence – evidence that squarely came within the rule of *Skipper* v. *South Carolina* – that was the casualty of the jury instructions in this case. As noted in the Statement of Facts, while in the structured setting of the Youth Authority, respondent attained the number two position on a Youth Authority fire crew in the hot and inhospitable terrain of the foothills of the Sierras; he showed a capacity for religious and moral development under the mentorship of the sponsor family; and he reciprocated by exercising a positive influence on their teen-age son. Just as clearly as he demonstrated positive qualities while in the Youth Authority, he went downhill when released on parole. As defense counsel candidly informed the jury, "what I hope the evidence suggests to you is Fernando cannot make it on the outside," in contrast to "the experience that he had inside, the kind of development he undertook, the kind of experiences he had with the Haros as compared with his being placed out on his own." J.A. 167.

The Youth Authority evidence was an important, indeed crucial, part of respondent's presentation in mitigation, even though defense counsel candidly acknowledged,

"I'm not going to insult you by telling you I think it excuses in any way what happened here." J.A. 166. It was wrongly excluded from the jury's consideration by the subsequent developments.

B. California's Factor (k) Instruction Functions Least Effectively With Respect to Informing a Jury of Its Obligation to Consider the Mitigating Import of *Skipper* Evidence.

The penalty jury was instructed with the "unadorned factor (k) instruction," see *Boyde* v. *California*, 494 U.S. at 377, although relabeled "factor (g)" in the edited version of the penalty factors given in this case. J.A. 184. The operative language of the instruction, referring to "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," does not on its face appear to encompass *Skipper* evidence that relates to the mitigating import of a defendant's likely future conduct rather than to the mitigating import of his past conduct surrounding the capital crime. However, *Skipper* makes clear that the penalty jury must be directed to consider and give effect to evidence of likely positive future conduct. *Skipper* stated that a penalty jury must "consider [] a defendant's past conduct as indicative of his probable future behavior," and where warranted "draw [] favorable inferences" about the defendant's "probable future conduct if sentenced to life in prison," even though the inferences of good future adjustment "would not relate specifically to petitioner's culpability for the crime he committed," because "such inferences would

be mitigating in the sense that they might serve as a basis for a sentence less than death." 476 U.S. at 4-5.[2]

The "extenuates the gravity of the crime" instruction is at best ambiguous as to whether it encompasses *Skipper* evidence, and at worst implicitly exclusionary of that type of evidence. *Boyde* concluded that as a general matter the instruction does an adequate job of informing the jury of the obligation to consider background and character evidence, in light of, inter alia, "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse," 494 U.S. at 382. However, *Boyde* also noted the difference between background and character evidence on one hand, and *Skipper* evidence on the other, id. at 382, fn. 5, and it is with respect to a defendant's *Skipper* evidence that the factor (k) instruction is most problematic and troublesome.[3]

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[2] As recently as *Tennard* v. *Dretke*, 542 U.S. 274 (2004) and *Smith* v. *Texas*, 542 U.S. 37 (2004), this Court has reaffirmed the rule of *Skipper* that a sentencing jury must be permitted to consider "evidence which is mitigating in the sense that . . . [i]t might serve as a basis for a sentence less than death" even though it has no nexus to the capital crime.

[3] Respondent does not contend that the factor (k) instruction standing alone would have an unconstitutional effect in a case where a defendant presented primarily or only *Skipper* evidence. Rather, Respondent's view is that the factor (k) instruction is sufficiently ambiguous with respect to *Skipper* evidence that it provides no affirmative assurance that a jury will understand its obligation to consider *Skipper* evidence. Respondent's argument here is that the factor (k) instruction provided *in this case* no affirmative counterweight to the demonstrably misleading instructions that followed.

C. The Trial Court's Decision to Give One of the Defense Supplemental Instructions That Contained References to Matters Addressed in Other Instructions That Were Not Given Created a Confusing Inconsistency Within the Instructions Given to the Jury.

As set forth above at pp. 5-6, the trial court gave certain instructions requested by the defense, but refused to instruct with the separate lists of aggravating and mitigating factors, in which respondent's *Skipper* evidence was explicitly referenced for consideration. The trial court did give portions of two instructions that defense counsel had proposed as follow-ups to the separate listing of aggravating and mitigating circumstances, which contained confusing references to a separate list of aggravating factors and a separate list of mitigating factors. J.A. 185-186.

As originally submitted by defense counsel, the separate list of mitigating factors referred to in this instruction was part of a set of proposed special findings that included a comprehensive list of mitigating factors that clearly described and encompassed *Skipper* evidence, and that in conjunction with the listing of aggravating factors would have provided a framework for the jury to contrast and compare the aggravation versus mitigation, and would have included express authorization to consider the Youth Authority evidence as *Skipper*-type mitigation. However, the trial court refused to give that instruction, and the only list that the jury actually heard about was the unitary CALJIC No. 8.84.1 list of combined aggravating and/or mitigating factors. The trial court's rulings had two results. First, all references were excised. Second, the trial court gave internally inconsistent instructions as to

whether there was a single list of relevant factors or separate lists of aggravating and mitigating factors. In sum, at the time the jury began deliberations, there was ample basis for confusion and uncertainty as to what the correct guidelines were for the penalty determinations.

D. The Trial Court's Impromptu Answers to the Jurors' Mid-Deliberation Questions Fatally Skewed the Resulting Death Verdict.

1. The jury's disclosure of a deep internal division.

The record shows that after deliberating for some hours, the jury sent the court two written questions, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" IV CT 1093. The clear import of these two questions is that (1) a majority of jurors then favored life imprisonment; and (2) there was a minority contingent to the contrary. The trial court re-read a previously given instruction that concluded, "In order to make a determination as to the penalty, all 12 jurors must agree, if you can." J.A. 190. Immediately, one juror asked, "If we can't, Judge, what happens?" The court responded, "I can't tell you that." At this point, a different juror forthrightly told the court, "That is what we wanted to know."

Upon the request of defense counsel, the court asked the foreman, "Do you think, Mr. Norton, you'll be able to make a decision in this matter?" Juror Hailstone interjected, "Not the way it is going." Jury foreman Norton concurred, "That is tough, yes." J.A. 190. The court then asked if there was a possibility of making a decision with more time to discuss the matter and the opportunity to go

over instructions, to which foreman Norton answered, "I believe there's a possibility," and Juror Huckabay added "We did need more time." J.A. 190.

What this colloquy reflects is a substantially divided jury with a life-leaning majority, a death-leaning minority, and pessimism about the prospect of a verdict.

2. Juror Hern's initiative to clarify and simplify the penalty decision.

Juror Hern's questions, phrased in plain English, demonstrate that she sought confirmation that the decision-making process was to be focused on the list of seven factors. Her questions reflect a single focus on the factors, without any reference to the evidence presented.

Her first question, "The statement about the aggrevation [sic] and mitagation [sic] of the circumstances, now, that was the listing?" J.A. 191, refers to the penalty phase factors as a "listing," echoing the trial court's use of the term in the previously given instructions ["I have previously read to you the list of aggravating circumstances which the law permits you to consider. . . ." J.A. 185] A "list" is a catalogue or series of items, and any particular item is either on a list or not. The question may well have been intended to clarify confusion from the conflicts in the initial instructions, where one instruction enumerated a *single* list of factors, while other instructions referred to separate lists of aggravating and mitigating factors.

This question was in the form of a "declarative question," a statement with an interrogatory ending. People ask questions in this form when they have an anticipated or desired answer in mind and want confirmation of that

answer. (In legal parlance, this type of question is often called a "leading question"). Ms. Hern sought confirmation that the list of factors (a) through (g) comprised the specific list of reference points for the penalty determination. Implicit in the form of her question is the premise that the "listing" was specific and finite.

Next, she asked, "Of those certain factors, we were to decide one or the other and then balance the sheet?" This is another declarative question, seeking *confirmation* of the assertion contained in the question, not an open-ended request for information. Second, it demonstrates a further effort by Juror Hern to confirm specifically that there was a circumscribed and finite number of permissible factors to consider. The clear import is that Juror Hern wanted confirmation that the list of factors the jury had heard was complete and exhaustive. The trial court gave her and the entire jury exactly that confirmation without any countervailing direction that all the evidence presented was proper for consideration, and that the list of factors was supplied only to *help* the jury consider the evidence, *not* to *limit* the jury's consideration. The colloquy conveyed that the penalty determination was to be focused on the seven listed factors, *not* on the evidence except as it fell within a listed factor. The trial court had every opportunity to emphasize that while the jury could consider the seven specific factors, albeit only as guide posts, it had to consider *all* the *evidence* under one or more of those factors, but the court failed to do so.

Third, Juror Hern employed a frequently used accounting term to characterize the jury's decision-making process, i.e., to "balance the sheet." The clear implication of this usage is to emphasize that the decision-making process is objective and mechanical. When an accountant

balances the sheet for a client, there is no room for subjectivity as to the bottom line once the income and expense items have been duly entered, i.e., the client is either in the black, in the red, or breaking even. Translated into the capital sentencing context, Juror Hern's question and the trial court's response confirmed that the jury's task was to enter the aggravating or mitigating valence as to each of the specified factors, and then balance the sheet to determine whether Belmontes was either in the black (life verdict); in the red (death verdict) or breaking even (unspecified). This interchange again conveyed that the jury was to focus on the seven factors, not on the comparative weight of the underlying evidence.

The trial court confirmed that there was a single and specific list, "That was the listing, yes, ma'am." The trial court similarly confirmed her view of the penalty decision-making as akin to working a spreadsheet, "That is right. It is a balancing process."

The trial court had a golden opportunity to answer Juror Hern's question – "now, that was the listing?" – in a manner that accurately and correctly informed the jurors of the breadth of evidence they were obligated to consider. The court could have drawn on the defense special instruction previously given, "the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or death sentence upon Mr. Belmontes," J.A. 186, or even better, on that portion of defense special instruction 3 previously refused – "you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances

[relating to the case or to the defendant, Mr. Belmontes] as reasons for not imposing the death sentence." IV CT 1014.

The trial court missed this last clear chance to direct the penalty jury to consider respondent's *Skipper* evidence, even though there were proper instructional formulations readily available. The proposed defense instructions that the court refused are virtually identical precursors to the instruction currently given to Texas capital sentencing juries in response to this Court's *Penry* decisions. See *Penry* v. *Johnson*, 532 U.S. 782, 803 (2001) [*Penry II*] ("Texas now requires the jury to decide 'whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.'"). Just as with the Texas trial court that erroneously instructed the sentencing jury in *Penry II*, the trial court in this case "had adequate alternatives available to it" as it responded to the jurors' mid-deliberation questions, but failed to avail itself of those constitutionally correct alternatives. Ibid.

3. The trial court's directive not to consider the matter of concern raised by Juror Hailstone's inquiry.

Immediately after the trial court gave unqualified confirmation in response to Juror Hern's questions that the jury was to consider only specified statutory factors, Juror Hailstone broached the subject of *non*-statutory factors and asked a question that *directly* raised an issue relating to respondent's future prison adjustment if sentenced to life – "Is it possible that he could have psychiatric treatment

during this time?" The trial court responded with a direct order *not* to consider that – "That is something you cannot consider in making your decision," J.A. 191 – without any explanation that non-statutory factors were *essential* for consideration if supported by the evidence, and that the *only* reason that the court was directing the jury not to consider the prospects for psychiatric treatment was that the parties had not presented evidence on that particular issue.

The clear message to the jury was that the jury could *only consider* the specifically listed factors as confirmed by the court's answer to Juror Hern's question, but could *not* consider other unlisted factors because unlisted factors were outside the legal rules for decision-making, i.e., out of bounds for juror consideration.

As the jurors continued their deliberations, they must have understood that their task had been considerably simplified. Rather than having to concern themselves with subjective issues of possible future adjustment in prison, the jury could focus on the specifically designated aggravating and mitigating factors and make their decision limited to those factors.

Based on the trial court's diametrically opposite responses to Juror Hern's questions versus Juror Hailstone's, the jury would have gotten the message that to be considered in the penalty determination, the evidence *had* to qualify as an enumerated factor or it was out of bounds.

In sum, the trial court's contrasting responses to Juror Hern's and Juror Hailstone's questions transformed the list of statutory factors from a helpful guideline that "only points the sentencer to a subject matter," into a "factor [that] ... require[s] a yes or no answer to a specific question," *Tuilaepa*

v. *California*, 512 U.S. 967 (1994), and *not* point the sentencer to the *Skipper* subject matter.

E. The Arguments of Counsel Reinforced the Erroneous View that Respondent's *Skipper* Evidence Did Not Fall Within Factor (k) or Any Other Factor.

The closing penalty arguments to the jury reveal a back and forth dialogue between the prosecutor and defense counsel in which both of them treated respondent's good prison adjustment evidence as *not* falling within the scope of factor (k) and *not* extenuating the gravity of the crime.

1. The prosecutor's acknowledgment that respondent's *Skipper* evidence did not fall within the enumerated instructional factors.

The prosecutor's argument included a segment in which he enumerated the penalty facts, (a) through (g) in this case, and then gave the jury his views on whether the penalty evidence qualified for consideration under the factors. The prosecutor went through (a) the circumstances of the offense; (b) other criminal conduct; (c) prior felony conviction; (d) mental or emotional disturbance; (e) duress; (f) age of the defendant; and (g) "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." J.A. 152-153.

Regarding the last factor, the prosecutor expressed his reservations whether the evidence of respondent's religious conversion while incarcerated fell within *any* of the enumerated statutory mitigating factors:

> All right. With respect to these others, I suspect that you will be told – I can't imagine that you won't be told that defendant's religious experience is within the *catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime.*
>
> *I'm not sure it really fits there. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration."* J.A. 154 (emphasis supplied).

This passage epitomizes the constitutionally unacceptable "mixed signals" as to the import of the mitigating evidence condemned in, inter alia, *Penry* v. *Johnson*, 532 U.S. at 802 (reversing death sentence because of internally contradictory and unclear instructions regarding sentencing responsibility). The prosecutor expressly questioned whether respondent's evidence of his custodial religious experience as indicative of good future behavior fell within any of the enumerated factors – "I'm not sure it really fits in any of them." J.A. 154. Thus, the prosecutor pointed out and focused the jury's attention on the language of factor (k) and the disjuncture between the enumerated factors and the mitigating evidence presented. The prosecutor proceeded to provide his views on how the evidence of respondent's religious experience should be viewed in the penalty determination, *independent* of any enumerated factor.

2. Defense counsel's concession that respondent's *Skipper* evidence did not extenuate the gravity of the crime.

Defense counsel responded directly to the prosecutor's comment that "I can't image that you won't be told that

the defendant's religious experience is within that catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime," J.A. 154, and counsel expressly disavowed any intention to argue that the mitigation evidence "excuses in any way what happened here," J.A. 166: "I'd like to comment about the evidence that we've presented and what Mr. Sueyres told you he thought it means *and I'm not going to insult you by telling you I think it excuses in any way what happened here*," because "that is not the reason I asked these people to come in." J.A. 166 (emphasis supplied).

Defense counsel was responding to the prosecutor's argument, and was apparently trying to gain credibility with the jury by disavowing any effort to shoehorn the future good conduct evidence into the ill-fitting or non-fitting extenuate-the-gravity-of-the-crime container. Counsel's tactical concession reinforced the jury's confusion and uncertainty whether the evidence of future good institutional adjustment was cognizable under the enumerated factors. Neither counsel contended that it *did* fit within any factor; rather, the prosecutor expressed doubt that it fit in anywhere, and defense expressly conceded that it did *not*. Both counsel did comment on the import of the evidence, without any attempt to tether it to a particular factor. The arguments of counsel that respondent's evidence of custodial religious experience did not fall within any enumerated factor likely caused the jury to view it with suspicion and skepticism, and then to disregard it when the trial court instructed the following day, "You must accept and follow the rules of law as I state them to you." J.A. 175. That evidence did not fall within the rules of law as stated by the trial court.

The comments of counsel underscored, as in *Penry* v. *Johnson*, 532 U.S. at 802, that the jurors would have had to *violate* their oath to give effect to the non-statutory portions of respondent's mitigation. *Penry* granted habeas corpus relief because of conflicting and misleading jury instructions, whose problems were compounded by arguments of counsel because counsel's "explanation only reminded the jurors that they had to answer the special issues *dis*honestly in order to give effect to Penry's mitigating evidence." Ibid.

F. The Jury's Subsequent Questions Confirming the Improperly Restrictive Consideration of Mitigating Evidence.

The subsequent questions asked by the jurors provide confirmation that they were diverted from the mitigation evidence of future institutional adjustment and re-focused on the circumstances of the crime, narrowly defined. On the day following the interchange regarding deadlock, the jury asked for certain testimony to be read, including respondent's testimony from the *guilt phase*, the pathologist's testimony from the *guilt phase*, and Bob Bolanos' testimony from the *guilt phase, all focused on the circumstances of the crime itself*. It is certainly a strong indication that the jurors believed that they were directed to consider the circumstances of the crime as the primary decision-making factor. After rehearing testimony of the ugly circumstances of the crime itself and without any further reference to the penalty phase evidence, the jury returned a death verdict. The trial court's responses to the juror's questions had refocused them on the crime and away from the primary mitigating evidence.

G. The Mutually Reinforcing Effects of the Instructions and Argument.

This is a case in which a number of case-specific factors contributed to the unconstitutional verdict, rather than a single instructional deficiency as in *Penry* v. *Lynaugh*, 492 U.S. at 322 ("Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment. We agree."). Rather, this case falls more within the type of combination constitutional deficiency that required relief in, inter alia, *Penry* v. *Johnson*, 532 U.S. at 804, in which a supplemental instruction was given in addition to the deficient instruction of *Penry I*, but which did not cure the problem: "Although the supplemental instruction made mention of mitigating evidence, the mechanism it purported to create for the jurors to give effect to that evidence was ineffective and illogical" and "[t]he comments of the court and counsel accomplished little by way of clarification." Ibid.

Here, the jury began its deliberations without any extrinsically imposed constraints on its consideration of evidence, and when the internal debate was expansive, a majority of jurors favored a life verdict. However, when the trial court confirmed in response to Juror Hern's questions that the deliberations were to be confined to the list of factors, and when the court flatly rebuffed Juror Hailstone's inquiry regarding consideration of non-statutory matters, the decisional framework unconstitutionally favored a death verdict.

The jury would have been deterred from considering and giving effect to respondent's evidence of prospective institutional adjustment for a number of reasons. First, it does not fit within any natural reading of any of the seven enumerated factors, as the prosecutor pointed out to the jury. Thus, the jury received very "mixed signals," *Penry II*, 532 U.S. at 802, from the prosecutor himself as to whether respondent's evidence properly fell within the catchall factor or within *any* permissible factor. J.A. 186.

Next, defense counsel's response to the prosecutor's argument was an express disavowal that respondent's evidence "excuses *in any way* what happened here." J.A. 166 (emphasis supplied). While counsel used the word "excuse" rather than "extenuate," the two words are often used interchangeably, see *Boyde*, 494 U.S. at 382 ("Petitioner had an opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death"). Most importantly, once the jury saw that defense counsel could not even muster an effort to claim that the *Skipper* evidence was cognizable under any of the listed factors, the jury would all too likely have viewed that evidence and the accompanying argument as a well-meaning but unavailing effort to appeal to the jury on matters that were not authorized for consideration, just as Juror Hailstone's concerns about psychiatric treatment, which the trial court expressly told the jury were not permitted for consideration.

The jury was given a clear directive that some matters were proper for consideration and that others were not.

Juror Hern's question elicited an unreserved judicial affirmation that the specified factors were to be the jurors' focus, without any accompanying exhortation that all of respondent's evidence had to be at least *considered* under the "extenuate-the-gravity-of-the-crime" factor. Juror Hailstone's question elicited an equally unequivocal judicial admonition that the subject matter of her question – the possibility of psychiatric treatment – was out of bounds and off limits. The jury resumed deliberations with a clear understanding that some matters were approved for consideration, specifically the enumerated factors, while others were out of bounds and off limits, and with the only specific guidance as to where respondent's *Skipper* evidence fell coming from the arguments of counsel and treating it as outside the scope of the enumerated factors.

In sum, the jury returned to deliberations with very mixed signals emanating from the evidence, the instructions, and the arguments presented. Some of respondent's evidence fell within the deprived childhood type of character evidence that would likely be viewed as mitigating evidence as described in *Boyde*, but other equally or more important parts of respondent's evidence just did not fit within the "gravity of the crime" factor, or any other factor, under any natural reading of the instruction and in light of defense counsel's candid disavowal that it in any way excused the crime.

The jury had to reconcile these mixed signals. On one hand, both attorneys treated the *Skipper* evidence as falling outside the scope of the enumerated factors, but nonetheless gave their respective views to the jury as to how it should be viewed in the penalty decision. On the other hand, the trial court instructed the jury that "[y]ou

must accept and follow the rules of law as I state them to you." J.A. 175. Under these circumstances, there is a strong likelihood that the jury gave predominant weight to the court's final instructions to hew to the enumerated factors, accepted counsels' consensus that respondent's evidence of positive prospects for institutional judgment did *not* fall within any legally cognizable factor, and rejected counsels' invitation to bend the rules and consider evidence that was apparently as far out of bounds as was Juror Hailstone's concern about custodial psychiatric treatment.

This incorrect view of the sentencing framework best explains why the jury's only subsequent question related to guilt phase evidence regarding the crime itself, and why the majority of life-leaning jurors voted for death the following day. Under the simplified decision-making framework that the trial court approved during the mid-deliberation colloquy, the jury likely felt obligated not to consider and weigh respondent's evidence of Youth Authority religious experience as a predictor of positive future institutional judgment. The jury would likely have viewed defense counsel's heartfelt argument regarding respondent's Youth Authority experience, conspicuously untethered to any statutory factor, as a well-meaning but unauthorized invitation to look outside of the permissible rules – as reaffirmed in mid-deliberation by the trial court – that constrained their decision.

This case is not like *Boyde* or *Brown* v. *Payton*, 544 U.S. 133 (2005), in which the jurors could have been misled by the instructions only if they viewed the entire penalty defense as a "charade." Here, respondent's evidence fell within a number of mitigation categories, some of which would likely be given due consideration under the

view described in *Boyde* that a hard lot early in life mitigates bad conduct later in life. However, what made respondent Belmontes *different* from the countless capital defendants with sorry stories of deprived childhoods is that when he was committed to an institutional setting with internal structure and clearly prescribed goals, *he shaped up*. His death verdict was unconstitutional because his jury was all too likely deterred from considering his positive prospects for institutional adjustment as an extension of his admirable adaptation to the Youth Authority as a reason for voting life.

This unusual combination of events resulted in a violation of respondent's Eighth and Fourteenth Amendment rights. "Evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating," and "[u]nder *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Skipper*, supra, 476 U.S. at 5. Accord: *Penry* v. *Lynaugh*, 492 U.S. at 325.

II. THE STATE'S ARGUMENTS SEEKING TO AVOID THE CONCLUSION OF THE NINTH CIRCUIT PANEL AND CRITICIZING THE PANEL DECISION ARE MERITLESS.

A. The State's Untenable Claim of a Conflict Between the Panel Majority Opinion and this Court's *Boyde* Jurisprudence.

The State argues that a conflict exists between the Ninth Circuit majority panel decision and this Court's *Boyde* jurisprudence. The two decisions are entirely complementary.

1. The import of *Boyde*.

Boyde held that California's unadorned factor (k) instruction generally permits the jury to consider background and character evidence of various types as mitigation evidence.

However, nothing in the *Boyde* majority opinion asserts that the unadorned factor (k) instruction is an exemplary, much less foolproof, means of informing a penalty jury of its sentencing responsibilities. *Boyde* concluded that factor (k) performed an adequate job of directing the jury to consider background and character evidence, but there is a latent ambiguity in factor (k) when institutional adjustment evidence is presented.

There is a legitimate and logical perspective that certain types of constitutionally compelled mitigating evidence, e.g., evidence relating to future positive prison adjustment, do *not* extenuate the gravity of the capital crime and, therefore, are not authorized for consideration under factor (k). In fact, it could very well be viewed as insensitive, if not insulting, for a defense attorney to argue that these types of mitigation "extenuated the gravity of the crime." Defense counsel *in this case* expressly informed the jury that he would not "insult" them by arguing that the Youth Authority evidence "excuses in any way what happened here." J.A. 166; see Part II-C-2, below.

Boyde was based on a *probabilistic* assessment of the *likely* effect of an unadorned factor (k) instruction, and did not purport to vouch for the efficacy of the instruction in all situations.

2. The panel's reference to the *Boyde* distinction between background and character evidence versus future institutional adjustment evidence.

The Ninth Circuit simply noted a point previously made in *Skipper* v. *South Carolina*, i.e., that a penalty jury must "consider [] a defendant's past conduct as indicative of his probable future behavior," and where warranted "draw [] favorable inferences" about the defendant's "probable future conduct if sentenced to life in prison," 476 U.S. at 4-5, even though the inferences of good future adjustment "would not relate specifically to petitioner's culpability for the crime he committed," because "such inferences would be mitigating in the sense that they might serve as a basis for a sentence less than death." Id. The Ninth Circuit, recognizing that much of respondent's mitigating evidence fell within the rubric of *Skipper*, rather than within the more traditional "background and character" type of evidence addressed in *Boyde*, concluded that "[a]t the least, the unadorned factor (k) instruction is ambiguous with respect to *Skipper's* requirement that the jury be permitted to consider and give effect to evidence bearing on defendant's probable future good conduct when it decides whether to impose the death penalty, see 476 U.S. at 5, and thus with respect to the jury's right to consider Belmontes' most important mitigating evidence." Panel Opinion, Appendix 295a.

It is readily apparent that the panel opinion took no contrary or incompatible position with respect to *Boyde*, but rather recognized this Court's own differentiation between the nature of the evidence offered in *Boyde* versus the nature of evidence offered in *Skipper*. The panel's view

faithfully tracks this Court's differentiation of the two types of evidence as set forth in *Boyde* itself:

> In *Skipper*, we held that a capital defendant must be permitted to introduce in mitigation evidence of post crime good prison behavior to show that he would not pose a danger to the prison community if sentenced to life imprisonment rather than death. The testimony that petitioner [Boyde] had won a dance contest while in prison, however, was introduced not to demonstrate that he was a 'model prisoner' like Skipper and therefore unlikely to present a risk of future dangerous, but to show that he had artistic ability" as part of Boyde's "overall strategy to portray himself as less culpable than other defendants due to his disadvantaged background and character strengths in the face of those difficulties. *Boyde*, 494 U.S. at 382, fn. 5.

This Court recognized that Boyde's evidence of dancing ability was presented to and could have been considered by the penalty jury under the factor (k) instruction with respect to positive background and character evidence, but specifically noted that the evidence was *not* offered as a prognosticator of good future prison adjustment, and offered no opinion as to whether the factor (k) instruction was adequate, ambiguous, or deficient with respect to evidence supporting an inference of positive future conduct.

The State argues that either no such distinction was made in *Boyde* or alternatively, that any such distinction is erroneous. Petitioner's Brief (P.B.) 23-24. However, this Court has not so held, and the panel majority did no more than recognize that the Court has not resolved that issue. That view is an accurate assessment of this Court's case

law, and does not demonstrate a tension or conflict between this Court's jurisprudence and the panel majority. The panel majority can hardly be pilloried for recognizing a distinction made by this Court.

B. Other Deficiencies in the State's Arguments Regarding the Case-Specific Factors Relied on by the Panel Majority.

1. The State's failure to recognize the confusing instructions given by the trial court that conflicted with the factor (k) instruction.

Petitioner fails to acknowledge the inherent ambiguity and confusion in the pre-deliberation instructions. The trial court first instructed with a unitary list of relevant factors authorized by California Penal Code § 190.3, but obviously did not categorize them as either aggravating or mitigating. J.A. 183-184. The court then told the jury that it had "previously read to you the list of aggravating circumstances which the laws permits you to consider . . . ," J.A. 185, but in fact there had *not* been any reading of a separate list of aggravating factors. The court continued, "However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." J.A. 186. There was never any designation of a separate list of mitigating factors, or even a specification of which factors within the unitary list were mitigating, either illustrative or exhaustive. The prosecutor argued that the factors in the unitary list "are either aggravation or mitigation as you find them

to be," J.A. 153, and that, for example, "the age of the defendant goes both ways," J.A. 154.

This jury was not given two lists of factors as in other states, e.g., Florida, see *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), where one is clearly designated as aggravating, and the other designated as mitigating, but the jury was *told* that there *were* two lists, which must have been confusing, and which as noted above was the result of the trial court's decision to give some, but not all, the defense proffered special instructions. The defense had *proffered* separate lists of aggravating and mitigating factors, but the trial court declined to provide these to the jury, while delivering an instruction that *referred* to these separate lists. That anomaly was a likely cause of jury confusion, and explains Juror Hern's quest for clarity that there was actually one list, and "Of those certain factors, we are to decide one or the other and then balance the sheet?" J.A. 191.

2. The State's incorrect assertion that during the mid-deliberation colloquy the trial court directed the jury to go over the original instructions.

Petitioner suggests that any potentially untoward consequences of the mid-deliberation colloquy were ameliorated because "during this same informal conference with the jurors, the court directed them to 'go over the instructions again with one another.' J.A. 190." P.B. 38. In fact, the court made no such directive.

Rather, after the jury reported serious disagreement and foreman Norton remarked that it was tough going, the trial court *asked* the jury, "Do you think if I would allow

you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" J.A. 190. That judicial *query* was the *only* reference to the prior instructions during the entire mid-deliberation colloquy, and was followed by a flurry of direct questions and answers. That single reference to prior instructions as a *possible* aid to further deliberations can in no way fairly be characterized as a *directive* to review the prior instructions.

What actually happened was that after the inquiry about the possibility of reviewing the preceding instructions, various jurors asked specific questions about the decision-making framework that reflected the failure of the prior instructions to convey a clear understanding of the framework. Because there was no directive to review the prior instructions, petitioner's claim that "[t]he trial court's directive to review the previous instructions would have cured any possible confusion," P.B. 38, citing *Weeks* v. *Angelone*, 520 U.S. 225, is untenable.

The trial court in *Weeks* did the *opposite* of what the trial court did in this case. The *Weeks* jury asked, "If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?" The trial court commented to counsel that "I don't believe I can answer the question any clearer than the instruction [originally given]," id. at 229, and then re-read verbatim "the instruction that [this Court] upheld in *Buchanan* v. *Angelone*, 522 U.S. 269, 139 L. Ed. 2d 7002, 118 S.Ct. 757 (1998), as being sufficient to allow the jury to consider mitigating evidence." Id. at 231.

Weeks then noted that following this re-instruction, the jury deliberated without further questions before returning a death verdict; based on the available indicia of what occurred, this Court found that "*the most likely explanation* is that the jury was doing exactly what it was instructed to do: that is, weighing the mitigating circumstances against the aggravating circumstance." Id. at 235 (emphasis supplied).

In this case, the "most likely explanation of what occurred" is that the jury returned to the jury room, followed Juror Hern's simplified framework as confirmed by the court, lopped off from consideration respondent's evidence of Youth Authority religious experience as outside the boundaries of the enumerated factors, and returned a death verdict without considering and weighing respondent's *Skipper* evidence in mitigation.

3. The State's untenable claim that the jurors' questions show mere conscientiousness rather than confusion.

Petitioner argues that "[a]s Judge Callahan understood in a way the panel majority failed to see, these juror inquiries do not necessarily establish any jury confusion but rather 'just as easily that the jury was taking its duty seriously before reaching a verdict,'" P.B. 38, referring to Judge Callahan's dissent from the Order Denying Rehearing En Banc. This is a complete non sequitur.

Any conscientious juror deliberating in a penalty trial who was in fact "taking [his or her] duty seriously" *would* ask questions of the judge when there was confusion, uncertainty, or disagreement as to the applicable legal standards. Jurors who were *not* taking their duty seriously

would not take the trouble to ask questions to eliminate confusion, uncertainty or disagreement, but would simply shrug "whatever" and take the path of least resistance.

Respondent *presumes* that all jurors were taking their duty seriously, but the more conscientious the jurors were, the more likely they would ask questions because they were confused about the correct decision-making framework, and the more likely that they would faithfully follow instructions that purported to clarify the cause of confusion.

Finally, notwithstanding Judge Callahan's admonition that "[a]ppellate courts should not speculate why a juror asked a particular question," P.A. 92, this Court has repeatedly and realistically reviewed the context of juror questions to determine the "most likely explanation," *Weeks*, 528 U.S. at 235, of what the jury was actually doing. *Shafer* v. *South Carolina*, 532 U.S. 36 (2001) ("Shafer's jury left no doubt about its failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means"); *Simmons* v. *South Carolina*, 512 U.S. 154, 178 (1994) ("[T]hat the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison"); *Bollenbach* v. *United States*, 326 U.S. 607, 612-613 (1946). The "most likely explanation" in this case is that the initial and internally contradictory instructions caused confusion among a sharply divided jury; jury Hern sought confirmation of a simplified and objective decision-making framework; the trial court unreservedly confirmed her proffered model; and under that framework the life-leaning jurors could not give mitigating effect to respondent's evidence of good prospective institutional adjustment.

4. The State fails to acknowledge that the mid-deliberation instructions provided the framework in which the jury actually reached its penalty decision.

The state's position regarding the mid-deliberation colloquy is cursory and fails to acknowledge that this Court has long recognized the paramount importance appropriately accorded to mid-deliberation jury instructions in determining the actual decision-making basis that the jury relied on. *Bollenbach* v. *United States*, 326 U.S. at 612 ("Particularly in a criminal trial, the judge's last word is apt to be the decisive word," and "[i]f it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge").

The federal appellate courts applying *Bollenbach* have confirmed the special emphasis that jurors place on mid-deliberation instructions. *Arroyo* v. *Jones*, 685 F.2d 35, 39 (2d Cir. 1982) (mid-deliberation instructions "enjoy special prominence in the minds of jurors" because they are "freshest in their minds," "isolated from the other instructions they have heard," "received by the jurors with heightened alertness," and "generally have been given in response to a question from the jury"), cert. denied, 459 U.S. 1048, 74 L. Ed. 2d 617, 103 S. Ct. 468 (1982). The trial court's unreserved confirmation of Juror Hern's simplified decision-making framework, apparent from the face of the colloquy and confirmed by the context and subsequent conduct of the jury antecedent to its death verdict, confirms that the death verdict was unconstitutionally rendered. See *Penry* v. *Johnson*, 532 U.S. at 804 ("Any realistic assessment of the manner in which the supplemental instruction operated would therefore lead to

the same conclusion we reached in Penry I: '[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence' "); *Hitchcock* v. *Dugger*, 491 U.S. at 398-99.

III. THE STATE HAS DISTORTED THE PANEL'S DECISION IN CLAIMING A *TEAGUE* VIOLATION.

The State is correct that respondent's judgment became final on January 17, 1989, when this Court denied certiorari on his direct appeal, P.B. 42, but the controlling authority that governs the outcome of this case had long been decided in the form of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), as explained in *Hitchcock* v. *Dugger*, and other cases. Respondent has *always* relied on the controlling precedent of this Court with respect to this claim. In the Petition for Writ of Certiorari filed in November 1988 following the affirmance of the death judgment by the California Supreme Court, respondent's question 2 was as follows:

> Whether the trial court's penalty phase instructions, including both those based on the sentencing statute as well as those given extemporaneously in response to a jury question, improperly curtained the jury's consideration of mitigating evidence and skewed the jury's determination toward death in violation of the Eighth and Fourteenth Amendments.

Respondent expressly relied on settled law, including *Mills* v. *Maryland*, 486 U.S. 367, 384 (1988) ("The possibility that a single juror could block [] consideration [of all mitigating evidence], and consequently require the jury to

impose the death penalty, is one we dare not risk"), *Eddings* v. *Oklahoma*, 455 U.S. 104, 119 (1982) and *Hitchcock* v. *Dugger*. See Petition for Writ of Certiorari, pp. 9-11. Hitchcock specifically granted relief in 1987 because of an instructional barrier to giving mitigating weight to "capacity for rehabilitation," 481 U.S. at 399. Petitioner appropriately refers to the "*Lockett* line of cases," including *Hitchcock*, P.B. 44, but argues that "[c]onsistent with *Lockett* and its progeny, Belmontes was allowed to present in mitigation whatever relevant background and character evidence he wished." That is true but irrelevant. Both defendants Hitchcock and Penry were permitted to present whatever relevant background and character evidence they wished, but nonetheless obtained relief from this Court because the accompanying instructions interfered with the sentencer giving effect to the evidence. The penal decision in no way extended the reach of this Court's cases. The basic constitutional principle relied on by the Ninth Circuit was that the "Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate," 414 F.3d at 1131, a well-settled principle that long pre-dated the decision of the California Supreme Court in 1989.

Petitioner cites and relies on *O'Dell* v. *Netherland*, 521 U.S. 151, 157 (1997), but that case supports respondent's position. O'Dell's death sentence was final in 1988, and he subsequently petitioned for habeas corpus relief in reliance on *Simmons* v. *South Carolina*, 512 U.S. 154. In response to a *Teague* objection, *Teague* v. *Lane*, 489 U.S. 288 (1989), O'Dell argued that *Simmons* was dictated by *Skipper* v. *South Carolina*. O'Dell lost because *Simmons* established a new rule that an instruction must be given

as to what would happen to the defendant under state law after a sentence was imposed, while *Skipper* confirmed the pre-existing rule that "[e]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating," and that "[u]nder *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), such evidence may not be excluded from the sentencer's consideration." *Skipper*, 476 U.S. at 5.

That is exactly the rule that respondent invokes here and under which the panel majority granted relief.

The same rule required relief in *Penry* v. *Lynaugh*:

> Penry argues that those assurances were not fulfilled in his particular case because, without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence of his mental retardation and abused childhood in rendering its sentencing decision. *The rule Penry seeks – that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed – is not a "new rule" under Teague because it is dictated by Eddings and Lockett.* Moreover, in light of the assurances upon which *Jurek* was based, we conclude that the relief Penry seeks does not "impos[e] a new obligation" on the State of Texas. *Teague*, 489 U.S. at 301, 492 U.S. at 318-319 (emphasis supplied).

The Ninth Circuit panel majority opinion applied the rule of *Eddings* and *Lockett* in a straightforward manner.

CONCLUSION

Wherefore, for the foregoing reasons, respondent respectfully requests that this Court affirm the judgment of the Ninth Circuit.

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Respectfully submitted,

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